



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. MOHAMMED, JA. (IN CHAMBERS))

CIVIL APPLICATION NO NAL 194 OF 2019)

BETWEEN

DR. DIVYA J. PATELAPPLICANT

AND

GUARDIAN BANK LIMITED.....RESPONDENT

(Application for leave to file the record of appeal out of time, against the Judgment and Decree of the High Court of Kenya at Nairobi (Sewe, J.) delivered on 7th August, 2017

in

NAIROBI HIGH COURT CIVIL CASE NO. 630 of 2006)

RULING

BACKGROUND

[1] By a notice of motion dated 21st June, 2019, the applicant, **Dr. Divya J. Patel** has moved this Court seeking leave under **Rule 4 of the Court of Appeal Rules** (the Court Rules) to file a record of appeal out of time. The intended appeal is against the judgment delivered by the High Court in **Nairobi High Court Civil Case No. 630 of 2006**.

The applicant seeks the following orders:

- a) **That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the whole Judgment and Decree of the High Court of Kenya at Nairobi by the Honourable Lady Justice Olga Sewe delivered on 7th August, 2017.**
- b) **The costs of this application be provided for.**

[2] The application is anchored on the grounds that the period of and the reasons for the delay in filing the record of appeal are excusable; and that the delay is not inordinate having been occasioned by the Court Registry; that the notice of appeal was lodged and served upon the respondent within the prescribed time; that the appeal is arguable and has overwhelming chances of success as per the draft Memorandum of Appeal; that there is no degree of prejudice which will be suffered by the respondent if the extension sought is granted; and that it is in the interest of justice that the time for filing and serving the record of appeal be extended.

[3] The respondent did not file a replying affidavit and was not represented at the hearing of the instant application. The Court record indicates that counsel for the respondent were duly served with the hearing notice. That notwithstanding, the Single Judge considered the application within the established principles of granting the orders sought.

SUBMISSIONS

[4] At the hearing of the application, learned counsel, **Ms Wilkistar Mumbi** represented the applicant and submitted that the impugned judgment was delivered on 7th August, 2017 and the Notice of Appeal was lodged on 14th August, 2017 which was within the prescribed time. **Ms Mumbi** further submitted that counsel for the applicant wrote to the Deputy Registrar on 17th August, 2018 requesting for typed

proceedings to enable them file an appeal to this Court. Further, that the applicant's advocates wrote several letters to the High Court Registry in a bid to follow up on the typed proceedings but were informed that the relevant court file could not be traced. It was counsel's further submission that on or about 30th January, 2019, the Deputy Registrar informed the applicant's advocates that the typed proceedings were ready for collection whereupon a record of appeal was prepared and the instant application was filed for enlargement of time.

[5] It was counsel's further submission that the intended appeal is arguable with high chances of success; that the delay in filing the record of appeal was not occasioned by the applicant as there was delay on the part of the Court Registry to avail the typed proceedings; that the application has not been overtaken by events; that the respondent will not suffer substantial prejudice if the orders sought are granted; and any loss occasioned by the grant of the orders sought can be compensated by way of monetary damages; that the instant application is unopposed; and in the interest of justice, the orders sought should be granted.

DETERMINATION

[6] I have considered the application, the affidavits on record, submissions, the authorities cited and the law. The discretion that I am called to exercise in the determination of this application is provided **under Rule 4 of the Court Rules** which states as follows:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

[7] The power to extend time under **Rule 4 of the Court Rules** are well settled. In **Fakir Mohammed v. Joseph Mugambi & 2 others** [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04) this Court stated as follows:

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors.

[8] In **Wasike V Swala** [1984] KLR 591, this Court stated as follows regarding the exercise of discretion under **Rule 4 of the Court Rules**:

“As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:-

- “a) That there is merit in his appeal;**
- b) That the extension of time to institute and/or file the appeal will not cause undue prejudice to the respondent; and**
- c) That the delay has not been inordinate.”**

[9] These are the principles that will guide my decision herein. On the merit of the appeal, the applicant contends that she has an arguable appeal. I have perused the Draft Memorandum of Appeal and find that the intended appeal is arguable as it raises issues for determination, *inter alia* whether in the circumstances of this case the applicant was entitled to an award of damages from the respondent for breach of contract. An arguable appeal is not one that must succeed but one which is not frivolous and merits consideration by the Court. I find that in the circumstances of this case the respondent will not suffer substantial prejudice if the orders sought in the instant application are granted.

[10] On the issue of delay, the law does not set out any minimum period of delay but requires that the delay be satisfactorily explained. In the instant application, the applicant exhibited copies of letters that their counsel had written to the Deputy Registrar of the High Court following up on the typed proceedings. In the circumstances of this case, I find that the delay in filing the record of appeal has been satisfactorily explained.

[11] The upshot is that I find merit in this application and I allow it. I make the following orders:

- i) That the applicant shall file and serve its Record of Appeal within Thirty (30) days from the date hereof;**
- ii) Failure to comply with the time line stipulated in (i) hereinabove, the Notice of Motion dated 21st June, 2019 shall stand dismissed with costs;**
- iii) Costs of this application to abide by the outcome of the intended appeal.**

Dated and delivered at Nairobi this 19th day of June, 2020

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR